IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 11

THE UNITED STATES, *Petitioner*,

v.

MARTIN WUNDERLICH, ANN M. WUNDERLICH, MARIE WUNDERLICH, E. MURIELLE WUNDERLICH and THEODORE WUNDERLICH, a Partnership, Trading Under the Name of MARTIN WUNDERLICH COMPANY.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENTS

HARRY D. RUDDIMAN,
JOHN W. GASKINS,
Attorneys for Respondents.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

CITATIONS.

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 11

THE UNITED STATES, *Petitioner*,

v.

MARTIN WUNDERLICH, ANN M. WUNDERLICH, MARIE WUNDERLICH, E. MURIELLE WUNDERLICH and THEODORE WUNDERLICH, a Partnership, Trading Under the Name of MARTIN WUNDERLICH COMPANY.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENTS

OPINION BELOW

The opinion of the Court of Claims (R. 159-170) is reported at 117 C. Cls. 92.

JURISDICTION

The judgment of the Court of Claims was entered on June 5, 1950 (R. 170). A motion for a new trial, filed on

August 14, 1950, was denied on October 2, 1950 (R. 171). By order of the Chief Justice, dated December 26, 1950, the time for filing a petition for a writ of certiorari was extended to and including March 1, 1951 (R. 174). The petition, filed on February 28, 1951, was granted on May 7, 1951 (R. 175). The jurisdiction of this Court rests upon 28 U. S. C. 1255.

QUESTIONS PRESENTED

1. Whether, under the standard form of Government construction contract, the determination by the head of the department of the amount of an "equitable adjustment" for changed work may be set aside upon a finding that the methods of computing the adjustment used by him were arbitrary and capricious and the results arrived at by such methods were grossly erroneous.

2. Whether the Court of Claims may set aside such a determination in the absence of an express allegation of bad faith, or such gross error or negligence as necessarily implies bad faith, or failure to exercise an honest judgment.

3. Whether the proof would support a finding of bad faith, or such gross error or negligence as necessarily implies bad faith, or failure to exercise an honest judgment[1].

CONTRACT PROVISIONS INVOLVED

Pertinent provisions of the contract and specifications are set forth in Appendix A, *infra*, pp. 24-25.

---

[1] Petitioner asserts that one of the questions involved is whether the determination of the amount of an "equitable adjustment" is a question of fact within the standard form goverment contract provision that a department head's decision on "all disputes concerning questions of fact arising under this contract * * * shall be final and conclusive upon the parties thereto". As shown, *infra*, pp. 5-7, this question is not presented here since the Court below did not hold that such a determination did not involve a question of fact.

STATEMENT

Respondents do not object to the Statement in petitioner's brief except as follows:

The full paragraph appearing on page 5 of petitioner's brief is not supported by the citations to the record. The following should be inserted in lieu of such paragraph:

> For the contractor's maintenance and repair rates the contracting officer substituted rates purportedly determined from experience on other jobs. His rates were generally computed at a certain percent of the rental rates. In only one instance does his schedule indicate that the repair and maintenance rates were taken from another job. Applying his rates to the number of hours actually used the contracting officer allowed only 5.28% of respondents' actual total cost of field repairs and maintenance for the season compared to 43% of such actual total cost allocable to the work under Order for Changes No. 3 (R. 129-130).

Respondents also object to the paragraph beginning at the bottom of page 5 of petitioner's brief and ending on page 6 as being incomplete. The following should be inserted in lieu thereof:

> The Bureau's equipment rental schedule and the Associated General Contractor's schedule on which it is based, set forth monthly rental rates for single shift operation of 8 hours per shift, which monthly rates are arrived at by dividing the average annual equipment ownership expense by the number of calendar working months, usually eight, that the equipment is normally used. These schedules also provide for a daily shift rate at 1/30 of the monthly rate, and provide for payment of one-half the first shift rate for second shift operation (R. 125-126, 127; Pltfs. Exs. 17-B and 17-C). The Associated General Contractor's schedule (Pltfs. Ex. 17-B)[2] provides that the monthly rate is not subject to

[2] Pertinent provisions of the Associated General Contractor's schedule (Pltfs. Ex. 17-B) are set forth in Appendix B, *infra*, pp. 25-28.

deductions for idle time but should be charged for the full calendar period elapsing between shipment to and from the job. It likewise provides that the daily shift rate should be charged for each calendar day without deductions for idle time during the period it is assigned to the job.[3]

The Bureau's monthly rates could not be applied directly to the work covered by Order for Changes No. 3 since the equipment was shifting back and forth between such work and other work on the job. Since records of the hours of actual operation were kept, the contracting officer used an hourly rate which was computed by dividing the Bureau's monthly rate by 30 to obtain a daily first shift rate, adding one-half of this amount for the second shift rate, and dividing the total by 16 hours to obtain an hourly rate to be applied to hours of actual operation. Such hourly rates made no allowance for idle time and would have required the respondents to operate 16 hours a day, 30 days a month, without any interruptions for weather, minor repairs or the like, in order to recoup the monthly rate (R. 127, Deft. Exs. 17-V, 17-W).[4]

SUMMARY OF ARGUMENT

Since the Court of Claims did not hold that a dispute as to the amount of an "equitable adjustment" was not a question of fact, this case does not involve any question

---

[3] The only witnesses who testified for petitioner on the subject, including the subordinate in the contracting officer's office who prepared the hourly rates used in the "equitable adjustment", admitted that the Bureau's own monthly rates likewise are paid for the full period that the equipment is assigned to the job without deduction for idle time due to such factors as holidays, weather and repairs. See pp. 331-333, 352, 355-357 of Appendix C to Brief for the United States.

[4] Moreover, most of the equipment was on second shift work only about 80 percent of the time it was on first shift work (R. 127). Thus, in addition to failure to reimburse respondents for the idle time customarily paid for in the Bureau's own monthly rates, petitioner's rates are also obviously unfair in that they gave equal weight to the much lower second shift rate even though the equipment was used much more on first shift operation.

whether the decision of the Court below is in conflict with *United States* v. *Callahan Walker Co.*, 317 U. S. 56.

The decision of the Court below setting aside the adjustment under Order for Changes No. 3 because of the arbitrary and capricious treatment of respondents' claim is in accordance with the principles of judicial review laid down by this Court. An express allegation that such adjustment was arbitrary and capricious, or was the result of bad faith, or the failure to exercise an honest judgment, or was so grossly erroneous or negligent as to imply bad faith, is not necessary in order to set aside such a determination, especially where the Government trial attorney was aware that the good faith of such determination was in issue. Even if this Court should hold that the department head's decision may not be set aside upon a finding that the methods of computation used by him were arbitrary and capricious, and that there must be a finding that his decision was not made in good faith, or in the exercise of an honest judgment, or was so grossly erroneous or negligent as necessarily to imply bad faith, the proof would support such a finding. In such event the case should therefore be remanded for more explicit findings on the question of good faith.

ARGUMENT.

I. The Court of Claims Did Not Hold That the Determination of the Amount of an "Equitable Adjustment" Was Not a Question of Fact.

Petitioner asserts that it would appear that the Court of Claims held that the dispute as to the amount of the "equitable adjustment" allowed on Claim No. 17 did not involve a question of fact and was not governed by Article 15 of the contract. Thus, petitioner states, the decision of the Court below conflicts with the decision of this Court in *United States* v. *Callahan Walker Co.*, 317 U. S. 56, holding that such a dispute did involve inquiries of fact to which the provisions of Article 15 were applicable.

Respondents have never contended, nor did the Court of Claims hold, that the dispute over the amount allowed in the change order involved in Claim No. 17 was not a dispute relating to a question of fact.

It is true that in the introductory part of its opinion (R. 161-166), before taking up any of the claims, the Court below held that Article 15 of the contract, covering disputed questions of fact, did not apply to disputed questions of law, i.e., interpretation of the contract documents. It also distinguished the provision of the specifications involved in *United States* v. *Moorman*, 338 U. S. 457, from paragraph 14 of the specifications in the present case[5], pointing out that paragraph 14 did not purport to make the decision of the contracting officer or head of the department final on questions of interpretation of the contract documents where the contractor had followed the prescribed procedure for administrative relief as far as possible to do so, whereas the specifications in the *Moorman* case made the departmental decisions on such questions final even though the prescribed appeal procedure had been followed. A reading of this introductory part of the opinion shows, however, that it was directed to a situation where the contractor protested certain work as being outside the requirements of

[5] Paragraph 14 of the specifications (R. 72) provides:

14. *Protests.*—If the contractor considers any work demanded of him to be outside the requirments of the contract, or considers any record or ruling of the contracting officer or of the inspectors to be unfair, he shall immediately upon such work being demanded or such record or ruling being made, ask for written instructions or decision, whereupon he shall proceed without delay to perform the work or to conform to the record or ruling, and, within 10 days after date of receipt of the written instructions or decision, he shall file a written protest with the contracting officer, stating clearly and in detail the basis of his objections. Except for such protests or objections as are made of record in the manner herein specified and within the time limit stated, the records, rulings, instructions, or decisions of the contracting officer shall be final and conclusive. Instructions and/or decisions of the contracting officer contained in letters transmitting drawings to the contractors shall be considered as written instructions or decisions subject to protest or objections as herein provided.

the contract documents, requested written instructions, but the Government representative refused to issue written instructions, saying that the work was required under the contract. This situation prevailed with respect to practically every claim but Claim No. 17. In that claim, however, there was no failure to issue written instructions nor is there any dispute as to the interpretation of the contract documents. On the contrary, by issuing Order for Changes No. 3 (R. 120-121) the contracting officer gave the necessary written instructions and admitted that the work required was a change in the contract requirements.

Moreover, in the portion of the opinion dealing specifically with Claim No. 17 (R. 167-169) the Court of Claims points out that the dispute in this claim is as to the amount of the cost of the work, and does not even suggest that any question of interpretation of the contract documents is involved. Rather, the opinion shows that the reason for setting aside the adjustment under Order for Changes No. 3 was the arbitrary and capricious administrative treatment of the claim.

In view of the above, respondents submit that the Court of Claims did not treat this claim as involving a disputed question of law rather than of fact, and that accordingly its decision is not in conflict with *United States* v. *Callahan Walker Co., supra.*

II. The Decision of the Court Below Is in Accordance with the Principles of Judicial Review Laid Down by This Court.

A. *The departmental findings and decision can be set aside if arbitrary and capricious.*—This Court, in its early decisions, laid down the rule that where a contract makes the decision of a designated official final on certain questions, such decision may not be reviewed by the courts in the absence of fraud, or bad faith, or such gross mistake or negligence as would necessarily imply bad faith, or a failure to exercise an honest judgment. *Kihlberg* v. *United States,*

97 U. S. 398, 402; *Sweeney* v. *United States*, 109 U. S. 618, 620; *Martinsburg & Potomac Railroad Co.* v. *March*, 114 U. S. 549, 554; *United States* v. *Gleason*, 175 U. S. 588, 607.

Such terms as "bad faith" or "failure to exercise an honest judgment" are difficult of precise and exact definition. However, this Court, in later cases has given guides as to the meaning of such terms. For example, in *Ripley* v. *United States*, 223 U. S. 695, 701, 702, this Court stated that "the very extent of the power and the conclusive character of his decision raised a corresponding duty that the agent's judgment should be exercised—not capriciously or fraudulently, but reasonably and with due regard to the rights of both the contracting parties." In *Saalfield* v. *United States*, 246 U. S. 610, 613, this Court stated that "the Chief of Ordnance and his superior officer, the Secretary of War, were to decide, not arbitrarily, but candidly and reasonably, whether the gun had satisfied the required test".[6]

From the above it is clear that an officer empowered by both parties to make a final decision has not performed his duty under the contract where his decision is arbitrary and capricious, or without rational basis, or cannot be regarded as an attempt to render an impartial decision.

It is, therefore, submitted that where, as in the present case, the contracting officer and the head of the department have used methods of computing the amount due under a change order which were found to be arbitrary and capricious, they cannot be said to have performed their duty under the contract to make their decisions candidly and reasonably, and with due regard to the rights of both parties.

As stated before, these officers used a method which reduced the Bureau's own monthly rental rates for equipment to hourly rental rates to be applied to hours of actual operation, and did so in such a way as to make no allowance

[6] The contract in that case provided that the Chief of Ordnance should determine disputes as to the meaning of the contract documents, subject to appeal to the Secretary of War whose decision should be final. See p. 612 of the opinion.

for the idle time paid for in their monthly rates, thus making it impossible for the contractor to ever recover the monthly rate. This vital defect was pointed out in the contractor's appeal (Pltfs. Ex. D, pp. 56-57) but was completely ignored by the department head in his findings and decision (see Appendix B, pp. 45-49, of Government's brief). Certainly, his indifference to the factual question presented, his failure to make a finding on the real question in dispute, and his approval of such obviously unfair hourly rental rates can lead to no other conclusion than that his decision was arbitrary and capricious, was without rational support, and was not the result of an honest attempt to render an impartial decision.

Petitioner asserts that judicial interference is precluded except where there is "a dishonest judgment" or "actual dishonesty" upon the part of the department head (R. 20, 29). It does not specify just what it means by the phrases but perhaps the Government means that it must be shown that the decision may not be set aside unless it was the result of something in the nature of a bribe.

No such rule can be spelled out of the decisions of this Court. For example, in *Ripley* v. *United States*, 223 U. S. 695, a contract for the completion of a jetty provided that a mound of riprap should be placed over and around the existing structure, and that when in the judgment of the Government agent in charge it had become sufficiently consolidated, large blocks should then be bedded in the crest. This Court set aside a decision of such agent refusing permission to place the crest blocks, upon a finding by the Court of Claims (p. 700) that the agent knew that large parts of the core were fully settled and ready for the placement of crest blocks at the time of his refusal, and that the refusal to allow the crest blocks to be placed when he knew that large parts of the core had fully settled and consolidated was gross error and an act of bad faith. There is nothing to indicate that the Government agent's decision was the result of anything in the nature of a bribe. Rather,

the basis of the decision is that the Government agent's decision was a breach of his duty to exercise his judgment reasonably, not capriciously, with due regard to the rights of both contracting parties. His failure to permit the contractor to go ahead with the work when he knew that the conditions prevailing should, under the contract, have permitted the work to go ahead, was held to be an act of bad faith. Similarly, in the present case, when the department head knew, or at least should have known from the information presented to him, that the method used by the contracting officer in reducing the Bureau's own monthly rental rates to hourly rates was unfair, it was an act of bad faith on the part of the department head, or a failure to exercise an honest judgment, when he gave perfunctory approval to the contracting officer's hourly rates in a finding and decision which ignored the unfair method of arriving at such rates.

When this Court speaks of exercising an honest judgment it is clear that it means that the Government officer is under a duty to make a sincere and serious attempt to exercise his judgment reasonably and impartially. It cannot be said that the department head in the present case made any such attempt in his decision approving the contracting officer's rental rates.

Nor can he be said to have made an honest attempt to arrive at equitable rates for repair and maintenance when he approved the contracting officer's schedule of rates, which, while purportedly based on experience of the Bureau and other agencies, itself indicates that in only one case was the repair and maintenance rate taken from another job, the others being computed at a certain percent of the hourly rental rates which themselves were arbitrary and inadequate. The findings also show that such repair and maintenance costs represented only a small fraction of the contractor's actual cost for repair and maintenance (R. 129-130).

Moreover, Article 15 of the contract, providing for finality of departmental determinations of disputed questions

of fact, should be considered together with Article 3 (Appendix A, *infra*, p. 24). This article makes it the duty of the contracting officer and the head of the department to make an "equitable adjustment" when a change is ordered. Such words certainly connote that the adjustment must be fair and impartial. It is therefore submitted that construing Article 15 in the light of Article 3, a determination of an amount due under a change order which cannot be said to be fair and impartial, but which is arbitrary and capricious is not final and conclusive.

In its brief (pp. 14-15) petitioner contends that the purpose of Article 15 is to avoid the expense and delay of litigation, that the Government has bought and paid for this provision, and that its purpose will be defeated if parties can nullify the provision if they are dissatisfied with a decision by which they have agreed to be bound. The answer is, of course, that the basis of setting aside the adjustment in the present case was not mere dissatisfaction with the departmental decision but rather its arbitrary and capricious nature. Moreover, the desirability of avoiding litigation is only one aspect of Article 15. While a literal reading of this article would lead to the conclusion that departmental decisions on questions of fact could not be set aside for any reason, this Court has refused to accord finality to such decisions where they violate fundamental standards of fair play.

Petitioner also contends (p. 14) that the advantage of competitive bidding will be lost if the successful bidder is later permitted to disregard Article 15 which, petitioner asserts, undoubtedly was given substantial weight in the bids of others. Here again petitioner's argument is based on the fallacious assumption that the Court below held that Article 15 may be disregarded. Moreover, it is certainly doubtful that the bidders on this contract or any other contract would assume that they would be bound by arbitrary and capricious decisions. Indeed, if such a rule were ever adopted by this Court the inevitable result would be that

in the central states, upon normal business conditions, and upon normal seasonal fluctuations of the industry. Where the average number of working months shown does not fit the experience of a specific contractor, the contractor should substitute the number indicated by his own experience.

The monthly expense rates are based on a single operating shift of 8 hours per day. Where the equipment is used on double or triple shifts, an additional charge of 50 per cent of the single shift rate for each such additional shift of 8 hours should be made. Charges for use in excess of one shift but less than a full additional shift should be made at a rate proportional to the extra shift rate. The monthly rate is not subject to deductions for Sundays or holidays and should be charged for the full calendar period elapsing between shipments to and from the job.

Daily Equipment Expense.

Since the idle time of equipment is taken care of by a factor in the monthly expense, no such factor should be used in computing a daily rate. The daily rate is derived simply by dividing the monthly rate by thirty. When a machine is charged to a job on a daily basis, the rate should be charged for each calendar day without deductions for Sundays, holidays, or other idle time during the period it is assigned to the job.

The period to be charged is the full time elapsing between shipment to and from the job.

* * * *